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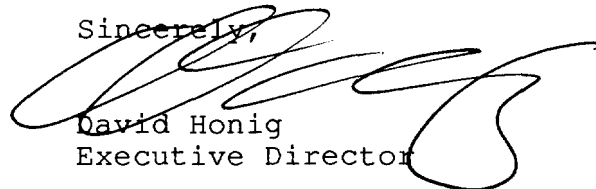
Hon. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Dear Ms. Roman Salas:

RE: MM Dockets 98-204 and 96-16
(Broadcast and Cable EEO)

Transmitted herewith are fourteen copies of a letter from counsel for MMTC and its 29 co-intervenors in MD/DC/DE Broadcasters Association v. FCC and USA, 236 F.3d 13, rehearing and rehearing en banc denied ___ F.3d ___ (Slip Op., released June 19, 2001). This letter is being supplied for inclusion in MM Dockets No. 98-204 and 96-16 (Broadcast and Cable EEO). See Report and Order, 15 FCC Rcd 2329, 2419 ¶229 (2000) (keeping docket open).

Sincerely,



David Honig
Executive Director

Attachment

/dh

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August 20, 2001

Theodore Olson, Esq.
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**FEDERAL COMMUNICATIONS COMMISSION
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Jane Mago, Esq.
General Counsel
Federal Communications Commission
445 12th Street S.W., 8th floor
Washington, D.C. 20554

Dear Colleagues:

RE: MD/DC/DE Broadcasters Association v. FCC and USA,
236 F.3d 13, rehearing and rehearing en banc
denied ___ F.3d ___ (Slip Op., released June 19, 2001)

On behalf of all of the intervenors, we are preparing a petition for certiorari in the above-referenced case ("Broadcasters"). Our clients feel compelled to proceed in order to preserve the viability of recruitment, by broadcasters, that is broad enough to reach qualified minorities and women. This represents the most moderate and widely accepted method of remedying and preventing discrimination.

In this letter, we shall set out comprehensively and at some length the case for a federal government petition for certiorari. We address three questions:

1. Do the underlying regulations merit a strong defense?
2. Which government interests are implicated by Broadcasters?
3. Is there any good reason not to seek certiorari?

I. The Regulations Are Worthy Of A Strong Defense

The FCC's regulations, as revised in January, 2000, were tailored to ensure that broadcast stations and cable television systems recruit broadly enough to ensure that all qualified potential job applicants, including minorities and women, would have a fair opportunity to learn about job vacancies. The regulations required broad outreach, and did not require broadcasters to favor any segment of the population in so doing. See Report and Order, 15 FCC Rcd 2329 (2000) at ¶78 ("R&Q") (broadcasters have a "[b]asic obligation" to "widely disseminate information concerning each full-time job vacancy").

The regulations gave broadcasters wide latitude on how to recruit, as long as the methods chosen would not exclude minorities and women from hearing about job openings. The regulations provided for no quotas or set-asides, required that no special consideration be given to minority and female job applicants, and expressly mandated that hiring decisions were to be made without consideration of race.

Theodore Olson, Esq.
Jane Mago, Esq.
August 20, 2001
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The regulations contemplated no regime of racial proportionality in employment. They eschew the stereotype that minorities and women are precisely as interested in broadcast employment as are white males. Instead, the test for discerning possible noncompliance with Option B of the regulations was whether even "few or no" minorities or women were recruited. It stretches the limits of stereotyping to suggest that not even "few or no" minorities or women are interested in working in broadcasting.

Finally, like the DOT's DBE program at issue in Adarand Constructors, Inc. v. Mineta, No. 00-730 ("Adarand VIII"), the FCC's EEO regulations were mandated by Congress. They were supported by a very thorough administrative record.

These regulations embody each and every attribute of a worthy remedial or preventive program to promote equal opportunity. Neither the regulations nor the process by which they were developed were flawed. The regulations are worthy of a solid defense.

II. Broadcasters Seriously Implicates Several Governmental Interests

There are at least five reasons the government should seek Supreme Court review.

First, the decision in Broadcasters would disable the FCC from complying with the express commands of Congress. See 47 U.S.C. §§151, 334, and 554(c) and (d) (1996).

Second, the decision could rob the FCC and possibly other agencies of flexibility in crafting regulations, on almost any subject, that can survive facial challenges to their constitutionality. Instead of applying well settled law holding that a facial challenge must prove that no construction of the rule is constitutional, the court of appeals' decision would allow courts to strike a rule if even one possible construction of the rule is unconstitutional.

Third, the decision threatens the presumption that an agency's explicit promises regarding how it will implement and interpret a regulation are to be deemed sincere. That presumption is essential to any system of regulation.

Fourth, the decision may jeopardize the effectiveness of a wide range of federal civil rights laws and regulations, including the government's ability even to collect data that includes race for the purpose of preventing and proscribing discrimination.

Fifth, the decision impairs the government's ability to tailor civil rights initiatives to satisfy industry's concerns.

We shall expand on each of these points below.

**1. The Decision Conflicts With
Express Commands Of The Congress**

Broadcasters would constrain the FCC's ability to implement an uncommonly clear Congressional mandate for equal opportunity. In the very first words of the Communications Act, Congress created the FCC, inter alia, to "make available, so far as possible, to all the people of the United States, without discrimination *on the basis of race, color, religion, national origin, or sex*, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service[.]" 47 U.S.C. §151 (1996) (italicized words added in 1996). Complying with Broadcasters would render it impossible for the FCC to comply with 47 U.S.C. §334 (1996), which provides that the FCC is not to change its television EEO regulations and is to conduct midterm review of television stations' EEO performance. Finally, Broadcasters would entirely overrule 47 U.S.C. §§554(c) and (d) (1996), which imposes recruitment and reporting requirements on cable systems. 1/

When congressional directives are declared unconstitutional by lower courts, the administrative branch typically declines to defend them only in the unusual instance in which the lower court has identified a constitutional interest that is clearly superior to Congress' interest in enacting the statute. In this instance, the court in Broadcasters had to reach far beyond any case authority, and far outside the record amassed by the FCC, to disable the FCC from satisfying Congress' directions. In particular, Broadcasters expressly prohibits the government from knowing whether a broadcaster's self-designed and unwritten EEO program will enable minorities and women -- including those whose highest qualifications would have resulted in an entitlement to employment -- to be notified when jobs are available. Until Broadcasters, every court that had considered the question had determined that no one has a constitutional right to be placed in a narrow, noncompetitive pool from which more qualified persons are excluded. 2/

**2. The Decision Robs FCC And Other
Government Regulations Of The
Presumption Of Constitutionality**

By misapplying the law of facial challenges, Broadcasters threatens to rob the FCC and other government agencies of their ability to craft regulations that can survive facial challenges

1/ The history of congressional support for FCC EEO regulation is provided in depth in the amicus brief of the Congressional Black Caucus in this case.

2/ Many of these cases are discussed in the intervenors' brief of MMTC et al. at 14-18.

to their constitutionality. See United States v. Salerno, 481 U.S. 739, 745 (1987) (a facial challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist under which the [law] would be valid. The fact that the [law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.") Thus, a party bringing a facial challenge must show that there is no way the rules could be applied constitutionally. Instead, the court of appeals struck the EEO rules because it thought that there might be one way the rules could be applied unconstitutionally.

Even the one way in which the court of appeals thought the rules might be capable of unconstitutional application was based on a hypothetical with no support in the record. The court suggested that in order to comply with Option B, a broadcaster that previously would recruit by placing a display ad in a "local newspaper" might "choose to run a smaller newspaper ad and use its remaining funds to run an ad in a publication targeted at minorities. This redirection of resources hurts those prospective non-minority applicants who would respond to the display ad but not to the smaller ad, and it does so only because of their race." Broadcasters, 236 F.3d at n. **. 3/ The dissent generously accepted, for the sake of argument, the proposition that recruiting budgets are "fixed in the short run" See Broadcasters, Dissenting Opinion of Judges Tatel, Edwards and Rogers ("Dissent"), Slip Op. at 5 (citing panel opinion, 236 F.3d at n. **). Actually, nothing in the record suggests that broadcast stations typically use newspaper display ads for recruitment, that they have formal "recruitment budgets", or that any such budgets are any more "fixed" than the broadcasters' electricity budgets. An FCC mandate to expand recruitment means adding minority recruiting sources at minimal cost, rather than removing nonminority sources -- just as an FCC

3/ The court of appeals referred to the first newspaper as the "local" newspaper and to the second newspaper as a "publication targeted at minorities." 236 F.3d at 21 n. **. But to the panel, "local" evidently meant "white." It is ironic that a court so bent on avoiding stereotypes failed to realize that a "publication targeted at minorities" can be "local" too. Adding to the irony, the panel did not realize that a "publication targeted at minorities" contains information valuable and accessible to everyone. Many people read more than one newspaper, and that the majority of those using media "targeted at minorities" are nonminorities. See Dissent at 3 ("[i]ndeed, broad outreach might reach more white males.") One would think that a broadcaster, being engaged in journalism, might benefit by attracting nonminorities possessed of sufficient broadness of mind and curiosity to read a "publication targeted at minorities."

mandate to light a broadcast tower does not cause a broadcaster to pull a light bulb out of the newsroom. It is clear that there are many constitutional ways to exercise Option B; the court's conclusion that the regulations were unconstitutional because there could be one way to apply it improperly would seriously undermine other FCC and government regulations.

**3. The Decision Threatens The
Presumption Of Agency Sincerity**

When a court, weighing a facial constitutional challenge to regulations, decides that it can disregard or discredit almost every material representation made by the government, it is difficult to see how any initial regulations of an agency on a subject touching the constitution can survive judicial review.

The FCC expressly said that it meant Option B to be severable, but in defiance of precedent the court of appeals chose not to believe the FCC. See Dissent at 5-8. Worse yet, the court refused to credit the FCC's representations concerning how it would implement the regulations. The FCC maintained that Option B was voluntary because a licensee could always elect Option A; it never promised to investigate even licensees that reported "few or no" minority applicants; it declined to require targeted recruiting, and it stated that it intended for broadcasters to expand outreach so as to include minorities and women rather than substitute outreach to minorities and women for outreach to white males. The court of appeals chose to believe none of this, even though there was not a shred of evidence that the FCC was not being candid. Dissent at 1-5.

In taking down the doctrine of administrative regularity, the court of appeals' decision has implications far beyond the field of civil rights. Nothing should be more precious to an agency than the presumption of sincerity and believability attaching to its opinions and to its briefs in court.

That presumption is particularly precious in mass media regulation. Every regulation of the mass media, whether rendered by the FCC, the FTC or the Antitrust Division of the Department of Justice, depends on the presumption that the government means it when it says the regulation is not to be implemented in defiance of the speech and press clauses of the First Amendment. Broadcasters destroys that presumption. Indeed, after Broadcasters, the mere fact that the FCC (or any other licensing agency) has "life and death" licensing power over a regulatee 4/ appears to render its regulations constitutionally suspect.

4/ Broadcasters, 236 F.3d at 19,

Nothing prevents any tribunal, considering a case on any subject, from citing Broadcasters as authority for the proposition that the government's word is not its bond.

**4. The Decision Potentially Threatens
A Wide Range Of Civil Rights
Programs And Data Collection Efforts**

This case potentially has civil rights implications far beyond the broadcasting industry. Targeted recruitment has been consistently upheld by the courts and supported by government officials of both parties. If government cannot even ensure that qualified minorities and women know about jobs and contracts, the goals of equal employment opportunity plainly will be undermined. Obviously, every civil rights initiative that is broader than the FCC's regulations could be in jeopardy, including the DOT program being ably defended by the government in Adarand VIII. The government's position in Adarand VIII is simply irreconcilable with the Broadcasters decision.

Internal government recruitment programs, including the FCC's, could be next in the line of fire. Their opponents will assert that the government is precluded from doing what it cannot compel its licensees to do. 5/

No antidiscrimination program can operate effectively without the ability to discern race and gender. Thus, courts have never faulted agencies for gathering and using this data for legitimate civil rights compliance purposes.

5/ See, e.g., U.S. Department of State and the Hispanic Association of Colleges and Universities (HACU), "Principles of Cooperation", June 11, 2001 (providing, inter alia, that the Department of State and HACU will exchange information on conferences, that the Department of State can sponsor HACU interns, and that the Department of State "may inform and disseminate information to HACU member institutions about career opportunities in both the civil and foreign services[.]") See also Executive Order 13171 (an order mandating steps to improve the representation of Hispanics in federal employment through, among other things, "further partnerships" with "Hispanic organizations whenever such partnerships and cooperation are possible") and Executive Order 12900, the White House Initiative on Educational Excellence for Hispanic Americans (focusing on outreach to colleges and universities with large Hispanic enrollments, among other activities).

The FCC sought this data to help prevent discrimination -- not to promote it. The FCC stated that it would use the applicant pool data generated by broadcasters that choose Option B for the limited and appropriate purpose of evaluating "whether the [recruiting outreach] program is effective in reaching the entire community." R&O ¶104. The FCC noted that "few or no females or minorities in a broadcaster's applicant pools may be one indication (and only one indication) that the station's outreach efforts are not reaching the entire community." Id. ¶120. The FCC added that "[w]e may ultimately determine that outreach efforts are reasonably designed to reach the entire community, even if few females or minorities actually apply for openings." Id. Therefore, the FCC has vowed to use the applicant pool data in a constitutionally permissible manner, and the FCC has explicitly prohibited discrimination. Any speculation that the FCC would use such data in any other manner was not supported by the record, and was beyond the scope of a facial challenge.

In a myriad of contexts, the government collects racial statistics for the constitutionally benign purpose of helping prevent and proscribe discrimination. See, e.g., Jury Selection and Service Act of 1968, 28 U.S.C. §1869(h) (requires federal government to "elicit" the race of all individuals considered for jury duty); 29 C.F.R. §1602.7 (employers required to provide race data about employees to comply with Title VII). For its part, the FCC collects racial data on broadcast ownership, and its Office of Workplace Diversity collects and publishes on the FCC's website data on the racial composition of FCC employees.

In its refusal to accept the use of race and gender statistics for civil rights compliance purposes, Broadcasters may undermine many federal civil rights enforcement programs. Such an outcome should be a matter of the deepest concern.

**5. The Decision Hampers Government Efforts
 To Tailor Civil Rights Initiatives So
 As To Reduce Burdens On Regulatees**

When an agency proposes new consumer, environmental, health, safety or civil rights regulations, industries sometimes stand in opposition. To maintain industry confidence, regulators quite properly try to accommodate their concerns without significantly diminishing the effectiveness of the regulations. Thus, the FCC acted wisely when it adopted Option B in an attempt to accommodate many broadcasters' desire for flexibility in designing their own EEO programs.

The FCC was correct that Option B was severable. Nonetheless, Option B was hardly an expendable throwaway. Option B's considerable value derived from its role in providing the industry an alternative method of complying with the overall equal employment mandate of the regulations.

Recall that during the rulemaking proceeding, the FCC tried valiantly to arrive at a menu of procedures so comprehensive that those using the menu would be certain to reach the entire community -- so certain, in fact, that the compilation of verifying recruitment statistics would be superfluous. Drawing on a voluminous record that included research studies and expert testimony, the FCC arrived at a menu that it designated Option A. However, many broadcasters felt that Option A was too expensive or difficult for them, given their size, their budget constraints, or demographic and social factors peculiar to their markets. These broadcasters preferred the additional option of designing their own programs. In attempting to accommodate these broadcasters, the FCC recognized that there was only one way to ensure that self-designed programs would actually reach the entire community: have those choosing that option to provide verification. This procedure -- Option B -- had an extra built-in advantage for the FCC: by allowing many broadcasters to experiment with a variety of self-designed approaches, the FCC over time would discern which techniques were most effective. That real-time information could lead ultimately to the day when the regulations could be further refined so that verifying statistics might ultimately become entirely unnecessary.

By striking Option B, Broadcasters constrains the government's ability to experiment with a variety of approaches as it undertakes to cure one of the most intractable and complex diseases suffered by the nation throughout its history. The choice of two options (and the menu approach in Option A) each stand squarely in the center of thoughtful regulatory efforts to promote equal opportunity and prevent discrimination. Had the FCC adopted just Option A, it would surely have faced allegations that it was placing broadcasters into a one-size-fits-all straightjacket. That, in turn, would have undermined the confidence and respect of one of the FCC's principal regulatory constituencies, thereby diminishing the effectiveness of regulations whose success would depend on the voluntarily good faith efforts of broadcasters.

The ability to experiment is especially critical to an agency entrusted with ensuring First Amendment protection. The FCC daily must answer to parents who feel that the very influential, value-mediating industries it regulates sometimes may set poor examples for their children. On the other hand, the FCC must also answer to broadcasters who fear that the FCC might chill its First Amendment rights.

Thus, it is particularly important that the FCC and the United States seek Supreme Court review of the appropriateness of arbitrarily diminishing an agency's ability to offer a menu of regulatory techniques aimed at promoting equal opportunity and preventing discrimination in American business.

**III. There Are No Good Reasons To
Abstain From Seeking Certiorari**

Several reasons have been advanced in opposition to seeking certiorari. These include:

1. the hope that the decision can be distinguished as an outlier;
2. the fear that denial of certiorari will add precedential weight to the decision in Broadcasters;
3. the hope that abandoning this case will make it easier for the FCC to develop new EEO regulations, and
4. the fear that seeking certiorari could have adverse political consequences.

These objections have been expressed in the best of good faith, but they lack sufficient merit to overcome the powerful case in favor of seeking Supreme Court review.

**1. The Decision Cannot Be
Distinguished As An Outlier**

The precursor to Broadcasters, Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, rehearing denied, 154 F.3d 487, rehearing en banc denied, 154 F.3d 494 (D.C. Cir. 1998) may be distinguished as a fact-specific ruling on an as-applied challenge to regulations. Lutheran Church considered the constitutionality of statistical case processing guidelines, which are seldom used in civil rights regulation.

However, Broadcasters cannot so easily be wished away. Broadcasters holds unconstitutional an entire civil rights regulatory initiative, and it does so in response to a facial challenge. Once the decision is final, opponents of civil rights protections are very likely to use it to attack many other civil rights laws and regulations.

**2. Denial Of Certiorari Will Not Materially
Extend The Reach Of The Decision**

After Hopwood v. Texas, 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1003 (1996), universities outside the states located in the Fifth Circuit wondered whether the Supreme Court's election to deny certiorari meant that their affirmative action admissions programs were invalid. After Broadcasters, proponents of recruitment residing outside of the District of Columbia need not await the Supreme Court's election on whether to grant certiorari to know the impact of the decision on other federal programs. Broadcasters was a facial challenge to national regulations, interpreted by a court exercising national jurisdiction.

Consequently, if a government certiorari petition is denied, the weight of the court of appeals' decision will increase by little or nothing. With or without certiorari, Broadcasters has the imprimatur of national applicability. To be sure, some misunderstanding of the effect of denial of certiorari is possible. Nonetheless, it is far more likely that a government failure to seek certiorari will be interpreted as open season on civil rights -- particularly when Broadcasters also trammels on so many deeply critical government interests that transcend civil rights.

3. Abandoning This Case Would Make It Even More Difficult For The FCC To Design New Regulations

Chairman Powell is absolutely correct in urging that new regulations are essential. The FCC ought to adopt strong EEO regulations in time for the license renewal cycle that begins in 2004. However, before it does that, the FCC should seek the maximum flexibility to adopt useful regulations. Supreme Court review of Broadcasters would enhance the likelihood that new EEO rules can be strong and smart, and that they will be the last word on the subject.

The nation has struggled for two generations to end discrimination and achieve integration in the public schools, in employment, housing, employment, public accommodations and the voting booth. This history has proven that civil rights doesn't lend itself very well to self-regulation or voluntary compliance. For their part, broadcasters failed voluntarily to integrate from 1920 through 1971; that is why the FCC adopted its original EEO regulations. Nothing suggests that in the period 1971-2001, the broadcasting industry miraculously became the first industry in the nation to shed all propensity for discrimination. Indeed, the opposite is probably true. A Radio/Television News Directors Association (RTNDA) report released two months ago indicates that minority participation in broadcast journalism is declining very sharply. 6/ We know of no reason for this alarming development other than reduced FCC EEO enforcement.

6/ See 2001 RTNDA/Ball State University Survey of Women and Minorities in Radio and Television News (2001) (reporting, inter alia, that the representation of minorities among radio journalists declined from 14.7% to 10.7% between 1994 and 2001.) No industrywide FCC EEO data has been available since 1997.

Unless the Supreme Court reverses Broadcasters, the FCC will have difficulty even reimposing Option A. 7/ Recall that the panel in Broadcasters did not reach many of the petitioners' more radical arguments. 8/ Thus, unless it is reversed, Broadcasters will only embolden EEO opponents to promote their radical objections to any kind of FCC EEO enforcement.

Furthermore, the panel decision suggested that had it reached the issue of compelling governmental interest, it could have held that remedying and preventing discrimination in broadcasting may not be compelling because "it is far from clear that future employment in the broadcast industry is a public benefit for which the Government is constitutionally responsible." 236 F.3d at 21. While this dicta is clearly wrong, it threatens to further embolden EEO opponents.

Consequently, before trying to write new regulations, the FCC should petition the Supreme Court to overturn the court of appeals' decision. That will help increase the FCC's flexibility to write strong and smart regulations.

7/ As noted above, Option A by itself is arguably more burdensome to the industry than a regulation embodying the choice of Options A and B. Thus, industry opposition to new regulations could be even more vociferous if Broadcasters attains finality.

8/ In the rulemaking below, EEO opponents objected to each and every aspect of proposed regulations, including Option A (which was approved by the Court). They took the position that just having to recruit widely enough to reach the entire community, including minorities, was too "burdensome" for them. In their appeal, the State Broadcasters Associations contended that simply by expressing a desire to eliminate homogeneous station workforces, the FCC was seeking racial proportionality (Brief of MD/DC/DE Broadcasters Ass'n. et al. ("Broadcasters Brief") at 25); that zero-tolerance nondiscrimination enforcement would somehow pressure a broadcaster to discriminate against nonminorities (id. at 28-29); that Option A is constitutionally invalid because it contains a menu item that contemplates co-sponsoring a job fair with an organization "whose membership includes substantial participation of women and minorities" (id. at 30-31; but see Broadcasters, 236 F.3d at 18-19, rejecting this argument); and that preventing discrimination is not a compelling governmental interest (Broadcasters Brief at 40-42).

**4. A Certiorari Petition Carries Little
Risk Of Adverse Political Consequences**

It is unfortunate but probably unavoidable that political considerations carry some weight in litigation decisions. Fortunately, such considerations are minimal in this instance. Many of those who have opposed race-conscious efforts to remedy discrimination in contracting and in public education have endorsed broad, targeted recruitment as a suitable alternative remedy. For example, in its brief in Adarand VIII, petitioner Adarand Constructors proposed a recruitment and enforcement regimen considerably more aggressive than the FCC's Option B: "[p]rophylactic devices for protection against discriminatory selection of bidders could include broadcasting all contracting opportunities. Means of exposing potential discriminators might include mandatory post-award publication of all bids received." Brief of Adarand Constructors, Inc. in No. 00-730, p. 20.

The FCC's EEO regulations would have imposed far greater costs on cable companies than on broadcasters. Yet in their comments in the rulemaking proceeding, every cable industry commenter generally endorsed the regulations. In the court of appeals, the National Cable Television Association was an amicus on the side of the government.

The regulations were not opposed by all broadcasters. Ten broadcast companies filed an amicus brief on your side -- among them well known companies like Entravision Communications, El Dorado Communications, Granite Broadcasting, Hispanic Broadcasting Corporation and Radio One. The President of one of the largest radio and television companies, Emmis Broadcasting, served as an expert witness for MMTC in the rulemaking proceeding. Furthermore, the parties and amici on your side in this case include a wide spectrum of the broadcasting industry itself, including, among others, the American Federation of Television and Radio Artists, the Black College Communications Association, the National Association of Black Owned Broadcasters, the National Association of Minorities in Communications, the National Hispanic Foundation for the Arts, and the Women's Institute for Freedom of the Press.

No broadcast companies, no conservative think tanks, and neither the National Association of Broadcasters nor any other broadcast organization challenged the new regulations in court. The only parties opposing these regulations in court are the state broadcast associations.

Finally and fortunately, Congress has spoken repeatedly and with remarkable bipartisanship in support of FCC regulation in this area. See p. 3 supra.

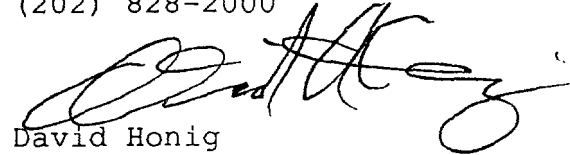
Theodore Olson, Esq.
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August 20, 2001
Page Thirteen.

We would be privileged to supply any additional information that you might find useful in considering whether to seek Supreme Court review.

Sincerely,

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cc: Hon. John Ashcroft
Hon. Michael Powell